IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Plaintiff in Error,* vs. TONY CURTZ, a Minor, by AGNES CURTZ, Guardian *ad litem*, *Defendant in Error.*	No. 2098.

Reply Brief of Plaintiff in Error

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Reply Brief of Plaintiff in Error

Counsel for defendant in error having predicated their argument in their brief on a false basis for the purpose of showing that the injured party was a licensee, it makes it necessary for us to present a short reply brief.

On page 11 of their brief they say, "*It is admitted that the cars were standing on Dock Street,*" and again on page 14 of their brief they say, "It must always be remembered that, in the case at bar, *the cars were on a public street;* left there to suit the convenience of the railway company, and on a public crossing; that the additional duty rested on the Railway Company to use some degree of care in moving these cars so as not to injure people *who might be passing over the crossing* which they were obstructing, partially, at the time."

All through their brief they have presented this case as though the cars were standing *on a public street or upon a public crossing* and that a person rightfully using the street or the crossing had been injured through the negligence of the employes of the Railway Company to anticipate the presence of such person *on the street* or *public crossing.* This is an unfair and incorrect presentation of the facts as shown by the record in this case. The fact is that all the tracks of the Railway Company between Eleventh Street and Fifteenth Street were west of Dock Street except where the track on which the cars were located, one of which plaintiff was in, crosses Dock Street under the Eleventh Street bridge. None of the eighteen cars standing on this track were in Dock Street, but all were west of Dock Street and south of the Eleventh Street crossing, and the record is full of the statements of the witnesses to this effect.

Willie Therkileson testified: "One of the tracks crossed Dock Street there at the Eleventh Street bridge,

and Dock Street runs on the east side of the tracks from Eleventh Street to Fifteenth Street". (Record, p. 37.)

The witness Farley testified: "Between Eleventh Street and Fifteenth Street there are six tracks. The one on the east side crosses Dock Street at the Eleventh Street bridge, then runs on the east side of Dock Street close up to the warehouse." (Record, p. 38.)

The witness Raymond testified: "Dock Street runs between Ninth Street and Fifteenth Street and one of the railroad tracks crosses Dock Street just south of the Eleventh Street bridge, and then runs north on the east side of Dock Street and close to the grain warehouse. *The tracks between Eleventh Street and Fifteenth Street are west of Dock Street, between Dock Street and the bluff".* (Record, p. 39.) He further testified: "There was a string of cars. I was pretty near up to the end of the cars when the engine hitched onto them, and that was, I should judge—about 75 feet south of the Eleventh Street bridge." (Record, p. 40.)

The witness Trow testified: *"This track does not run in Dock Street, but parallels the street and then crosses it on an angle up at Eleventh Street bridge."* (Record, p. 55.)

The witness Clarke testified: "I was loading poles on a wagon on the west side of Dock Street about 150 or 175 feet from where the boy was hurt. *These poles were east of the track the cars were on, between the track and the street."* (Record, p. 58.)

It, therefore, appears by all the evidence that the cars in question were not on Dock Street or on a public crossing, but were on the *private property of the Railway Company.* The authorities, therefore, cited in the brief of counsel for defendant in error in cases where the injured was a licensee are not in point, and for the purpose of making them appear in point counsel must have felt themselves justified in saying, "It is admitted that the cars were standing on Dock Street," when no such admission was made either on the trial of the case or in our opening brief, and as a fact the cars were not in Dock Street.

The doctrine of the "turntable cases" is not in point and can not be applied to a case of this character; it has been expressly repudiated when attempted to be applied to such a state of facts. As was said in the case of *Clarke vs. Northern Pacific Ry. Co.,* 29 Wash. 139, at page 149:

"We are not aware of any case which holds that the operation of trains over railroad premises makes them dangerous machines within the meaning of the turn table cases. It was expressly held that they are not such within the meaning of the rule in (Citing cases)."

It is suggested by counsel in their brief that no warning was given that these cars were about to be moved. It has been expressly held, as shown in our opening brief, that the exercise of due care does not impose upon the Railway Company the duty to send a man to examine a string of cars standing on a side track before they are coupled onto by an engine for the purpose of seeing if

some child, or children, is in or under the cars. The only warning that they can claim should have been given would be by ringing the bell or blowing the whistle on the engine. This engine was more than 650 feet distant from the point of accident. What notice would the ringing of the bell or the blowing of the whistle on this engine impart to a person in a freight car some 650 feet distant, especially when it is shown that in the yard a little further north several engines were at work? How would a person in the car, engaged in sweeping up loose wheat for his chickens, know that the whistle or the bell was intended as a notice that those cars were to be moved? It does not seem to us that such a proposition merits serious consideration. It was shown that the tracks north as far as Ninth Street, a distance of about a mile, were used for the handling of cars loaded with grain. It appears to us that to affirm the judgment would simply say that the Railway Company must examine every car, not only in this part of its yard, but in every other portion of its yard, before the same can be moved, for it is well known that men and boys not only go into the yard for the purpose of getting wheat, but they go there for the purpose of taking other kinds of merchandise and for the purpose of picking up the loose pieces of iron they find along the tracks in the yards, and this no railway company has ever been able to prevent.

ADDITIONAL AUTHORITIES.

We desire to call attention to the case of *Barney vs. Hannibal & St. J. R. Co.* (Mo.), 28 S. W. 1069, which decision has come to our attention since writing the opening brief in this case. We call special attention to this decision on account of the facts being in many respects similar to the case at bar and because of the very able opinion of the court in which the authorities are collected and discussed.

In the Barney case, children customarily played in the yards of the Railway Company and frequently rode on the moving cars as they were being switched. The employes of the Railway Company had been directed by their superiors to keep the children out of the yard, but "there was evidence, however, that defendant's employes did not obey their instructions at all times, but frequently, and without rebuke, would let the boys ride on the cars."

The court, among other things, in the opinion said:

"Ordinarily, a man who is using his property in a public place is not obliged to employ a special guard to protect it from the intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such vehicle to keep an outrider on purpose to drive such boys away, and that, if he does not, he is liable to any boy who is injured while thus secretly stealing a ride. In such a case no duty of care is incurred."

In this case it is also shown that the doctrine of the turntable cases does not apply under the facts set forth in the case at bar.

To the same effect is the very late case of *Louisville & N. R. Co. vs. Ray* (Tenn.), 134 S. W. 858, to which we also call attention.

Respectfully submitted,

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